



BOULT • CUMMINGS  
CONNERS • BERRY<sup>PLC</sup>

REC'D TN  
REGULATORY AUTH.

Henry Walker  
(615) 252-2363  
Fax: (615) 252-6363  
Email: hwalker@boultcummings.com

'02 MAR 14 PM 1 30

March 14, 2002  
OFFICE OF THE  
EXECUTIVE SECRETARY

David Waddell  
Tennessee Regulatory Authority  
460 James Robertson Parkway  
Nashville, TN 37243

Re: *In the Matter of Petition of Tennessee UNE-P Coalition to Open a  
Contested Case Proceeding to Declare Unbundled Switching an  
Unrestricted Unbundled Network Element*  
Docket No. 02-00207

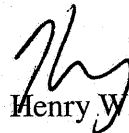
Dear David:

Enclosed for filing in the above-captioned proceeding are the original and thirteen copies of the Tennessee UNE-P Coalition's Response to BellSouth's Reply. A copy has been forwarded to BellSouth Telecommunications, Inc.

Very truly yours,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By:

  
Henry Walker

HW/nl  
Attachment

**BEFORE THE TENNESSEE REGULATORY AUTHORITY  
NASHVILLE, TENNESSEE**

IN RE: In the Matter of Petition Of Tennessee )  
UNE-P Coalition To Open Contested Case )  
Proceeding To Declare Unbundled Switching ) Docket No. 02-00207  
An Unrestricted Unbundled Network Element )

---

**TENNESSEE UNE-P COALITION RESPONSE TO BELL SOUTH'S REPLY**

---

The Tennessee UNE-P Coalition ("Coalition") hereby files its response to the "Reply to Opposition to BellSouth's Motion to Dismiss" ("BellSouth Reply") filed by BellSouth on March 8, 2002.<sup>1</sup>

**I. The TRA Can and Should Consider the Petition**

BellSouth's Reply boils down to a single, incorrect assertion. According to BellSouth, where "the FCC has already undertaken an impairment analysis under 251(d)(2), the state is prevented from undertaking an inconsistent impairment analysis by the terms of 251(d)(3)(B)." BellSouth Reply at 3. Thus, according to BellSouth, since the FCC limited the availability of switching under the national list of unbundled network elements ("UNEs") in the top 50 metropolitan areas,<sup>2</sup> the TRA is precluded from declaring switching an unrestricted UNE in Nashville (which is market number 48).<sup>3</sup> *Id.* For the reasons shown below, BellSouth is wrong;

---

<sup>1</sup> In a pre-hearing conference on March 11, 2002, the Hearing Officer granted the Coalition the opportunity to file this response.

<sup>2</sup> In density zone 1 of the top 50 markets, switching is only available for use in serving customers with three or fewer lines.

<sup>3</sup> As addressed in Section I.C. below, BellSouth's Motion to Dismiss does not address (and, by implication, does not dispute) the TRA's ability to declare switching a UNE throughout the rest of the state.

the TRA has the authority to declare switching an unrestricted UNE statewide and should conduct the impairment analysis requested by the Coalition.

**A. States Are Free to Add UNEs on a State Basis that the FCC Has Declined to Place on the National Minimum List**

As the Coalition demonstrated in its Petition and again in its Opposition to BellSouth's Motion to Dismiss ("Opposition"), the FCC has explicitly stated, and every state to consider the issue has agreed, that the states are free to add to the FCC's national minimum list of UNEs. While BellSouth seeks to create an exception to this rule in those instances where the FCC has rejected the inclusion of a network element on the national list, no such limitation to states' authority exists.

Tellingly, BellSouth offers not even a single citation in support of its view. This should come as no surprise, as the FCC's controlling language could not be any clearer: "section 251(d)(3) of the Communications Act *grants state public utility commissions the authority to impose additional obligations upon incumbent LECs beyond those imposed by the national list, as long as they meet the requirements of section 251 and the national policy framework . . .*"<sup>4</sup> Had the FCC intended to limit the ability of states to add UNEs on a state basis to only those UNEs that the FCC has never passed on, it would have said so.<sup>5</sup>

---

<sup>4</sup> *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 13 FCC Rcd 3696, ¶ 154 (1999) (emphasis added).

<sup>5</sup> In point of fact, the FCC said just the opposite. In the context of frame relay (a form of packet switching, which, like circuit switching in the top 50 markets, the FCC declined to place on the national list), the FCC made clear that state commissions are free to require unbundling within their state, upon a showing of impairment. *FCC UNE Order* ¶ 312. While BellSouth argues that the FCC's language regarding packet switching is inapplicable to circuit switching, BellSouth Rely at 5-6, it is wrong. In both cases, the FCC conducted an impairment analysis. With respect to packet switching, like circuit switching in the top 50 markets, the FCC was unable to make a finding of impairment on the record it had before it. The FCC therefore "decline[d] to unbundle specific packet switching technologies [including frame relay]". *Id.* ¶ 311.

By contrast, the Coalition has cited to numerous state decisions addressing the question of whether a state can add—on a state-specific basis—a network element that the FCC has declined to place on the national list. In every such case of which the Coalition is aware (a complete list of which is attached hereto), the state commission found that it was free to do so, provided that the necessary impairment showing could be made.<sup>6</sup> Those cases address the operator service and directory assistance (“OS/DA”) and packet switching elements rather than circuit switching. For purposes of this analysis, however, OS/DA and packet switching are in precisely the same posture as switching in the top 50 markets: in each case, the FCC conducted an impairment analysis and, as a result of that analysis, declined to place the element in question on the national list. If a state is free to declare OS/DA or packet switching a UNE within the state—as is unquestionably the case—then there is no basis for arguing that a state is not equally free to do so with respect to switching.

BellSouth’s position with respect to switching has become even more untenable in the last few days. On March 6<sup>th</sup>, the Texas Public Utility Commission, through the approval of a staff recommendation at its open meeting, found that switching should be available as an unrestricted UNE statewide.<sup>7</sup> This is precisely the same relief requested by the Coalition in this

---

<sup>6</sup> While most—but not all—of the decisions declined to add the UNE in question, this was because the state commission found that an adequate impairment showing had not yet been made—not because the state commission found that it lacked the intrinsic authority to add the UNE.

<sup>7</sup> The staff recommendation adopted by the Commission reads in pertinent part as follows:

Staff finds continued availability of UNE-P and all of the components of the platform (including [switching]) will bring the immediate benefit of customer choice in service providers as well as in service packaging to a larger geographic ubiquitous segment of the population. Additionally, there are operational and economic barriers (i.e. lack of electronic OSS) to self-provisioning or using non-SWBT [switching].

(footnote continued on next page)

proceeding. Significantly, the Texas Commission made its ruling over the objection of Southwestern Bell that the Commission was precluded from acting by the FCC's determination regarding the national list. As of the filing of this Response, no published decision is available. As soon as a decision is released, the Coalition will bring it to the Authority's attention.

Thus, as the Texas decision underscores, the national list is just that: a finding that, on a *national* basis, an element does or does not meet the impairment test for automatic inclusion in the national minimum list of obligations. A finding one way or the other with respect to the national list says nothing about whether there is impairment with respect to an element in a particular state, given the competitive conditions in that state.

**B. The FCC's Consideration of Tennessee-Specific Data Concerning Switch Deployment Has No Bearing on the TRA's Authority to Declare Switching a UNE**

BellSouth fares no better with its contention that the Authority is precluded from declaring switching a UNE in Tennessee because the FCC has already specifically examined data from the state. BellSouth is simply wrong that the FCC "consider[ed] the same evidence and arguments," BellSouth Reply at 4, as the Coalition raises in the Petition.

The FCC's analysis turned on the number switches deployed by CLECs and the location of those switches. The FCC began from the premise that generally, switching must be made available as a UNE because in most markets CLECs are "impaired in their ability to provide service, primarily because of the costs of self-provisioning switching in those markets." *FCC UNE Order* ¶ 255. The FCC found, however, that wherever there are a significant number of

CLEC switches, there must not be any impairment with respect to switching. Examining the data, the FCC found that the markets with significant switch deployment corresponded roughly to the top 50 markets. Based on that finding, the FCC used the top 50 markets as an easy, if oversimplified, way of drawing a line between those areas where CLECs are impaired and those where they are not.

What the FCC did *not* do, is to do what the Coalition is asking the TRA to do: conduct an impairment analysis that focuses on whether, even where CLECs have deployed switches, there can be impairment with respect to serving certain customers from those switches. That analysis is entirely separate from the analysis centering on switch-count that the FCC conducted in order to arrive at its top 50 market line of demarcation for the national list.

Significantly, while the FCC did not conduct a detailed impairment analysis relating to whether particular customers can be served where a CLEC has a switch in place, it did agree conceptually with the Coalition's view. After finding that CLEC switch deployment is concentrated in the top 50 markets, the FCC went on to find that even in those markets, CLECs were not serving—and thus presumably could not serve—the mass market using those switches. Implicit in this is the recognition that even where switches have been deployed, CLECs can be impaired without access to switching as a UNE because CLECs cannot economically serve certain types of customers through their own switching. While the FCC's selection of four lines as the demarcation between the "mass market" of residential/small business customers and medium/large businesses was irrational from a market perspective, the FCC was correct in principle.

Thus, the Coalition is not asking the TRA to make a finding that conflicts in any way with the analysis that the FCC conducted in adopting the national list. Rather, the Coalition is

asking the TRA to build on and refine the FCC's analysis by conducting an impairment analysis that focuses on the question of what kind of customers are CLECs impaired in serving even where a switch has been deployed.<sup>8</sup> The FCC did not have the benefit of a record that addressed that question; the TRA will.

It is irrelevant that the FCC had before it data that included Nashville. That data—including the data submitted by BellSouth to which it refers—primarily related to where CLECs have deployed switches; *not* to what customers are or can be served using those switches. It is precisely that latter type of data that the Coalition intends to place before the Authority in this proceeding. The Authority should not allow BellSouth to lure the Authority into prejudging the Coalition's Petition without the benefit of that record.

Moreover, the FCC used the data that it had regarding the Nashville market to arrive only at a broad national minimum policy. The FCC did not conduct a particularized analysis of the Nashville market to make a specific impairment finding with respect to Tennessee. Thus, even if the FCC's impairment analysis was relevant to the impairment analysis that the Coalition is asking the TRA to conduct, the FCC's ruling regarding switching in the top 50 markets cannot be regarded as somehow precluding the Authority from acting with respect to Tennessee.

Finally, the Coalition observes that the data that the FCC had before it is nearly three years old. As the TRA is all too aware, since May of 1999 when BellSouth submitted its data, there have been sweeping changes in the competitive industry. Many CLECs have failed, and many others have significantly changed their business strategies. Many of the assumptions that the FCC made regarding whether the existence of a switch demonstrated an absence of

---

<sup>8</sup> As the Coalition will demonstrate in this proceeding, it becomes possible for a CLEC to serve a customer economically through self-provisioned switching only where the customer is large enough to be served through a DS-1 or other high capacity loop rather than through individual analog lines.

impairment are not true today. For instance, the FCC assumed that CLECs with switches must be economically viable because they were able to attract capital. Clearly, even BellSouth would have to admit that assuming CLEC viability is no longer a reasonable assumption for an impairment analysis.

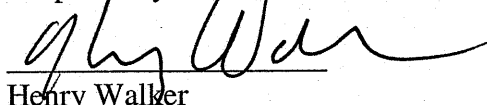
**C. BellSouth's Objections Relate Only to Metropolitan Nashville**

Even if BellSouth were correct—which it is not—that the FCC's finding with respect to Nashville precludes the Authority from acting with respect to that market, even BellSouth cannot seriously contend that the TRA is precluded from acting with respect to the rest of Tennessee. Under the FCC's minimum national list, switching is a UNE everywhere in Tennessee except for density zone 1 of the Nashville metropolitan area (and even there switching is a UNE for serving customers with three or fewer lines). By declaring switching an unrestricted UNE within Tennessee, the TRA will be adopting the same rule on a state-specific basis as currently applies under the FCC's national list for almost all of the state. Surely not even BellSouth can argue that the states are precluded from affirming and preserving the FCC's national findings on a state-specific basis.

**CONCLUSION**

For the reasons shown above, the TRA should deny BellSouth's Motion to Dismiss and expeditiously conduct the proceeding requested by the Coalition's Petition.

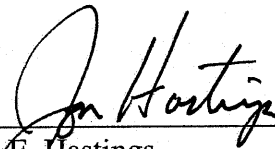
Respectfully submitted,

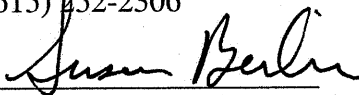


Henry Walker  
Boult, Cummings, Conner & Berry, PLC  
414 Union Street, Suite 1600  
Nashville, TN 37219  
615-244-2582

Albert H. Kramer  
Jacob Farber  
Dickstein Shapiro Morin & Oshinsky LLP  
2101 L Street, N.W.  
Washington, D.C. 20037  
202-828-2226

Attorneys for  
*Access Integrated Networks, Inc.; Birch Telecom of  
the South, Inc.; Ernest Communications, Inc.;  
NewSouth Communications Corp.; and Z-Tel  
Communications, Inc.*

  
Jon E. Hastings  
Bohrt, Cummings, Conner & Berry, PLC  
414 Union Street, Suite 1600  
Nashville, Tennessee 37219  
(615) 252-2306

  
Susan Berlin  
WorldCom, Inc.  
Six Concourse Parkway, Suite 3200  
Atlanta, Georgia 30328  
(770) 284-5498

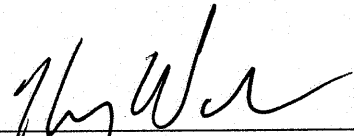
Attorneys for *WorldCom*

March 14, 2002

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded via fax or hand delivery and U.S. mail to the following on this the 14<sup>th</sup> day of March, 2002.

Guy Hicks, Esq.  
BellSouth Telecommunications, Inc.  
333 Commerce St., Suite 2101  
Nashville, TN 37201-3300

  
\_\_\_\_\_  
Henry Walker

**State Decisions Affirming State Authority to Add UNEs  
that the FCC Declined to Place on the National List**

***Operator Services and Directory Assistance***

1. *Instituting a Proceeding on Communications, Including an Investigation of the Communications Infrastructure of the State of Hawaii*, Docket No. 7702, Order No. 19018 (Haw. PUC Nov. 15, 2001)
2. *Joint Application of Sprint Communication Company, L.P., United Telephone Company of Kansas, United Telephone Company of Eastern Kansas, United Telephone Company of South Central Kansas, and United Telephone Company of Southeastern Kansas for the Commission to Open a Generic Proceeding on Southwestern Bell Telephone Company's Rates for Interconnection, Unbundled Elements, Transport and Termination, and Resale*, Docket No. 97-SCCC-149-GIT (Kan. PUC Apr. 27, 2000)
3. *Petition for Arbitration of an Interconnection Agreement Between American Telephone Technology, Inc., and GTE Northwest Incorporated, Pursuant to 47 U.S.C. Section 252*, Order No. 00-120; ARB 163 (Ore. PUC 2000)
4. *Investigation into Compliance Tariffs filed by U.S. West Communications, Inc., Advice Nos. 1661, 1683, 1685, and 1690*, Order No. 00-316; UT 138 (Ore. PUC Jun. 14, 2000)

***Packet Switching***

1. *Petition for Arbitration of the Interconnection Agreement between BellSouth Telecommunications, Inc., and Intermedia Communications, Inc., Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket No. 27385 (Ala. PSC Mar. 2, 2001)
2. *Petition of BellSouth Telecommunications, Inc. For Section 252(b) Arbitration of Interconnection Agreement with Intermedia Communications, Inc.*, Docket No. 991854-TP, (Fla. PUC Aug. 22, 2000)
3. *Covad Communications Company Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Amendment for Line Sharing to the Interconnection Agreement with Illinois Bell Telephone Company d/b/a Ameritech Illinois, and for an Expedited Arbitration Award on Certain Core Issues*, Docket No. 00-0312 (Ill. Com. Comm'n Feb. 15, 2001)

4. *Illinois Bell Telephone Company Proposed Implementation of High Frequency Portion of Loop (HFPL)/Line Sharing Service, Docket No. 00-0393 (Ill. Com. Comm'n Sept. 26, 2001)*